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In the Supreme Court of the United States

OCTOBER TERM, 1992

UNITED STATES DEPARTMENT OF JUSTICE, ET AL., PETITIONERS

v.

VINCENT JAMES LANDANO

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR PETITIONERS

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Respondent makes no attempt to rebut our submission that this case presents an important question under the Freedom of Information Act (FOIA) on which the federal courts of appeals are in conflict. Indeed, he readily acknowledges both the "split in authority among the circuit courts" and the "important" ramifications of the issue for the treatment of FBI records regarding confidential sources. Br. in Opp. 3-4.

1. As we show in the certiorari petition, the question presented—which concerns the showing the FBI and other federal law enforcement agencies must make in order to protect "confidential sources" under

FOIA Exemption 7(D)—is a recurring and important one. The court of appeals in this case ruled that the FBI had not adequately supported its invocation of Exemption 7(D), because it had not made a specific factual showing "of the particular circumstances of [each] interview or source." Pet. App. 28a. Nearly every other court of appeals to address the issue, by contrast, has recognized that the very nature of FBI witness interviews makes assurances of confidentiality "inherently implicit," and that Exemption 7(D) therefore protects information obtained in such interviews in the absence of evidence negating the confidential nature of a particular source. See Pet. 12 (collecting cases from six circuits).[1]

2. Respondent quibbles over the language in which the question presented should be cast, insisting that

[1] As we point out in the petition, only one other court of appeals appears to have imposed an evidentiary burden in Exemption 7(D) cases comparable to the one imposed by the Third Circuit here. See Pet. 8 n.5 & 19 n.11 (discussing *Wiener* v. *FBI*, 943 F.2d 972 (9th Cir. 1991), cert. denied, 112 S. Ct. 3013 (1992)). This Court's denial of certiorari in *Wiener* by no means militates against certiorari here; on the contrary, it makes it all the more important to resolve in this case the issue of what showing the government must make to sustain its invocation of Exemption 7(D). The instant case, moreover, presents the issue in a significantly more clear-cut and manageable manner than did *Wiener*. Whereas the Exemption 7(D) issue arose in *Wiener* in the context of an interlocutory ruling that more detailed affidavits were required to support withholding, this case involves a final rejection of the FBI's invocation of that exemption and a final judgment requiring disclosure. And whereas *Wiener* was potentially complex and involved a number of FOIA exemptions, our petition here clearly presents the single issue of the application of Exemption 7(D)—an issue on which there is a well-defined and acknowledged conflict among the circuits.

the rule the other courts of appeals have adopted embodies an improper "presumption." Br. in Opp. 6-7. As we have already explained (Pet. 16 n.9), however, labels are not important; the issue is the same regardless of whether it is thought to call for an inquiry into the nature of the "prima facie case" the government must present to support withholding under Exemption 7(D), or into the appropriateness of relying on a "presumption" in this setting. In either event, the need for a clear and consistent rule regarding what the FBI must do in FOIA litigation in order to protect its vital confidential sources (and information they furnish) from public disclosure cannot be disputed.

3. The sole argument respondent makes against certiorari is a weak attempt to set this case apart factually from the general run of Exemption 7(D) cases, on the ground that the FBI's affidavits supposedly are "so deficient" that he would prevail even if our view of the controlling law were adopted. Br. in Opp. 4-6.[2] This argument is based on a misstate-

[2] Respondent also takes issue with our characterization of the FBI's role in the underlying murder investigation, repeating the vague assertions he made below regarding the FBI's supposed participation in a "federal/state/local team that investigated and prosecuted the criminal case against" him. Br. in Opp. 2-3. As respondent appears to recognize, however, such arguments have nothing to do with the issues under Exemption 7(D) that are presented in our petition; they are pertinent, if at all, only to the issues addressed in respondent's cross-petition for certiorari, which seeks review of the court of appeals' holding that the FBI properly invoked Exemption 7(C) (the law-enforcement/privacy exemption) to protect other information. See *Landano* v. *United States Department of Justice*, cross-petition for cert. pending, No. 92-161 (filed July 24, 1992). We address those distinct issues in our brief

ment of the opinion below, and on a view of law enforcement that blinks reality.

Contrary to respondent's assertions, the court of appeals did not "conclude[] that * * * the outcome of the case would be the same" under our approach to Exemption 7(D), on the ground that the FBI's affidavit did not recite that the confidential sources at issue knew they were being interviewed by FBI agents. See Br. in Opp. 4. Rather, the court of appeals simply speculated that the existing record "might" still be inadequate under our approach, because of the lack of either such evidence concerning each particular source *or* a more general recitation regarding "consistent FBI practice." Pet. App. 25a n.4. Such speculation on the court of appeals' part was misplaced. The interviewers' identification of themselves as FBI agents is such a well-known and routine part of FBI interviews that the sort of recitations envisioned by the court of appeals would be superfluous.[3] In any event, if some further factual showing on this point were necessary, the matter may properly be dealt with on remand, following resolution by this Court of the appropriate *legal* standards governing an agency's invocation of Exemption

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in opposition to the cross-petition in No. 92-161, which we are filing simultaneously with this reply brief.

[3] See Federal Bureau of Investigation, *Manual of Investigative Operations and Guidelines, Manual No. 2815* (Jan. 31, 1978) (Section 7 (Interviews), item 7-1 (Use of Credentials for Identification): "Credentials (commissioner cards) shall be exhibited to all persons interviewed by Special Agents so there will be no doubt concerning the organization with which they are connected.").

7(D).[4] The potential existence of that factual issue in further proceedings therefore in no way detracts from the pressing need for definitive guidance from this Court to resolve the clear conflict in circuit authority on the threshold legal issue presented in the certiorari petition.

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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Solicitor General

AUGUST 1992

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[4] That course is especially appropriate because the notion that the FBI should specifically address the issue of the interviewees' knowledge that the interviewers were in fact FBI agents was never suggested by respondent in either of the courts below.

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